Supreme Court, U.S.
FILED
NOV 20 2015
OFFICE OF THE CLERK

No. 14-916

IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

LAUREN B. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JASON D. HIRSCH
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

THOMAS G. SAUNDERS
Counsel of Record
SETH P. WAXMAN
AMY K. WIGMORE
GREGORY H. PETKOFF
AMANDA L. MAJOR
JOSEPH GAY
MATTHEW GUARNIERI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
thomas.saunders@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. STATUS OF THE THREE PROCUREMENTS AT ISSUE 2

II. THERE IS A LIVE AND JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES 5

A. Capable Of Repetition 6

B. Evading Review 9

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page(s)

Camreta v. *Greene*, 131 S. Ct. 2020 (2011) 14

Deja Vu of Nashville, Inc. v. *Metropolitan Government of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001) 10

Doe v. *Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991) 11

FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 5, 6, 9

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 8, 10

Friends of the Earth, Inc. v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) 11

Gannett Co. v. *DePasquale*, 443 U.S. 368 (1979) 9

Honeywell International, Inc. v. *NRC*, 628 F.3d 568 (D.C. Cir. 2010) 10

Johnson v. *Rancho Santiago Community College District*, 623 F.3d 1011 (9th Cir. 2010) 10, 11

Kinnett Dairies, Inc. v. *Farrow*, 580 F.2d 1260 (5th Cir. 1978) 6

Matter of Aldevra, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011) 3

Matter of Aldevra, 2012 WL 10245511 (Comp. Gen. Nov. 12, 2012) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Aldevra; Kingdomware Technologies, 2012 WL 10245509 (Comp. Gen. Oct. 9, 2012) 8, 11

Matter of Kingdomware Technologies, 2011 WL 6359474 (Comp. Gen. Dec. 19, 2011) 3

Matter of Kingdomware Technologies, 2012 WL 1942256 (Comp. Gen. May 30, 2012) 2

Matter of Kingdomware Technologies, 2013 WL 393193 (Comp. Gen. Jan. 31, 2013) 8, 11

Matter of Kingdomware Technologies—Costs, 2012 WL 1655097 (Comp. Gen. May 10, 2012) 4

Matter of Kingdomware Technologies—Reconsideration, 2012 WL 6463498 (Comp. Gen. Dec. 13, 2012) 9, 11

Matter of Legatus6, LLC, 2011 WL 7485203 (Comp. Gen. Dec. 5, 2011) 12

Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 1, 5, 9

Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 6, 9

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 5, 10

Super Tire Engineering Co. v. *McCorkle*, 416 U.S. 115 (1974) 10

Turner v. *Rogers*, 131 S. Ct. 2507 (2011) 1, 5, 6, 8

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 14

Weinstein v. *Bradford*, 423 U.S. 147 (1975) 5, 9

Wisconsin Department of Industry, Labor & Human Relations v. *Gould Inc.*, 475 U.S. 282 (1986) 10

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS

31 U.S.C. § 1341(a)(1)(B) 12

38 U.S.C.
§ 8127 ..... 1, 8, 13
§ 8127(d) ..... *passim*
§ 8127(e)-(f) 7

41 U.S.C. § 6301(a) 12

Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 13

13 C.F.R. § 19.102 7

H.R. Rep. No. 109-592 (2006) 13

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Federal Procurement Data System-Next Generation, *List of Contract Actions*, https://www.fpds.gov/ezsearch/fpdsportal?s=FPDSNG.COM&sortBy=SIGNED_DATE&q=PRINCIPAL_NAICS_CODE%3A%22541511%22+DEPARTMENT_FULL_NAME%3A%22VETERANS+AFFAIRS%2C+DEPARTMENT+OF%22++SIGNED_DATE%3A%5B2012%2F03%2F15%2C2015%2F11%2F20%5D++AWARD_TYPE%3A%22delivery%22++OBLIGATED_AMOUNT%3A%5B25000%2C250000%5D&indexName=awardfull&y=13&x=14&templateName=1.4.4&desc=Y (last visited Nov. 20, 2015) 7

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA255P657SC1615* (Aug. 11, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA255P657SC1615 11

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA662C14446* (Sept. 29, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA662C14446 4

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA24712F0325* (Dec. 1, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24712F0325 4

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA24512F0622* (Feb. 22, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24512F0622 3

Federal Procurement Data System-Next Generation, *Transaction Report for HHS Award ID HHSN271201400201P* (Feb. 21, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=HHSN271201400201P 12

Federal Procurement Data System-Next Generation, *Transaction Report for Award ID W91CRB14F0017* (June 2, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=W91CRB14F0017 12

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA24612F4632* (July 31, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24612F4632 11

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Procurement Data System-Next Generation, *Transaction Report for HHS Award ID HHSN271201500128U* (Sept. 23, 2015), https://www.fpds.gov/ezsearch/fpdsportal?q=HHSN271201500128U 7, 11

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA69D12F3663* (Sept. 28, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA69D12F3663 11

Wright, Charles Alan, et al., *Federal Practice and Procedure* (3d ed. 2008) 6

VA, *Vendor Information Pages: Kingdomware Technologies, Inc.*, https://www.vip.vetbiz.gov/Public/Search/ViewSearchResults.aspx?SCID=2753179 (last visited Nov. 20, 2015) 6

INTRODUCTION

Pursuant to the Court's order of November 4, 2015, Kingdomware files this supplemental brief to address (1) whether the Department of Veterans Affairs ("VA") procurements at issue in this case have been fully performed, and (2) if so, whether the case is moot.

Kingdomware is not a party to any of the three contracts at issue and thus cannot say with certainty whether any of them has been fully performed. Based on publicly available information, it appears that these contracts lasted 10-15 months and that all three contracts have been performed.

However, there is still a live controversy between Kingdomware and the government because the same scenario is likely—indeed, virtually certain—to repeat itself again and again in the future for contracts of comparably short duration. The case thus falls squarely within the "special category of disputes that are 'capable of repetition' while 'evading review,'" *Turner* v. *Rogers*, 131 S. Ct. 2507, 2515 (2011), and therefore are not moot even though the specific "order attacked has expired," *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976). Indeed, disputes over government contracts are a paradigmatic example of controversies capable of repetition, yet evading review, particularly the types of contracts likely to elicit bids from small businesses like Kingdomware.

Service-disabled and veteran-owned small businesses have contested the VA's interpretation of 38 U.S.C. § 8127 for nearly a decade. During that time—including the three-and-a-half years that this suit has been pending—Kingdomware and other service-disabled and veteran-owned small businesses have re-

peatedly been deprived of the chance to compete on the terms Congress intended for a large number of VA contracts. This case represents the veteran-owned small business community's best and likely only realistic hope of securing review from this Court to force the VA to comply with the law. The question presented urgently requires an answer from this Court.

I. Status Of The Three Procurements At Issue

Kingdomware brought this action *pro se* in March 2012 in the Court of Federal Claims to challenge a series of VA procurements that the Government Accountability Office ("GAO") had found to be unlawful. Pet. App. 52a. With the benefit of *pro bono* counsel, Kingdomware filed an amended complaint in July 2012. *Id.* The amended complaint sought declaratory and injunctive relief as to three specific procurements, identified by the associated GAO bid protest number. In each case, the underlying contract now appears to have been fully performed.

A. GAO No. 406507. The first procurement, which was the primary focus of the proceedings below, involved an award for "emergency notification services" for a group of VA hospitals. Pet. Br. 21-22. The parties jointly stipulated to the facts concerning this contract award at summary judgment. JA30-32. In relevant part, a VA contracting officer issued Request for Quotation ("RFQ") No. VA245-12-Q-0078 to a single Federal Supply Schedule ("FSS") vendor, Everbridge Inc., on February 14, 2012, without first considering the Rule of Two in § 8127(d). JA31; *see also Matter of Kingdomware Techs.*, 2012 WL 1942256, at *2 (Comp. Gen. May 30, 2012) (noting that the "agency conducted market research prior to the acquisition and found that at least 20 [service-disabled veteran-owned small busi-

ness] concerns were capable of meeting the requirements at issue"). The contracting officer made a sole-source award directly to Everbridge, which is not a veteran-owned small business, on February 22, 2012. JA31. The contract covered a single base year, with options for two additional years. *Id.*

This contract was in effect for 15 months, ending in May 2013. The official online database of federal contract awards appears to indicate that the VA did not exercise either option year but did obtain a three-month extension of the initial term. *See* Federal Procurement Data System-Next Generation (FPDS-NG), *Transaction Report for VA Award ID VA24512F0622* (Feb. 22, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24512F0622.[1]

B. GAO No. 405727. The second contract at issue stemmed from the VA's issuance of RFQ No. VA-261-11-RQ-1514 on September 13, 2011, seeking quotations for "subscription and support services" for a one-year period for the VA San Francisco Medical Center. JA25; Am. Compl. ¶¶ 28-29. Kingdomware filed a bid protest with the GAO after the RFQ was issued, arguing in relevant part that the VA had failed to conduct any market research to determine whether competition for the award should be restricted to veteran-owned small businesses pursuant to § 8127(d). Am. Compl. ¶ 29. The GAO sustained the protest in December 2011. *Matter of Kingdomware Techs.*, 2011 WL 6359474, at *2-3 (Comp. Gen. Dec. 19, 2011) (citing *Matter of Aldevra*, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011)).

---

[1] For all citations to FPDS-NG, pertinent contract details may be accessed by clicking "View" next to the Award ID.

The VA declined to comply with the GAO's decision. Am. Compl. ¶ 40.

The contract, in the form of an FSS delivery order, was in effect for approximately one year, ending in September 2012. *See* FPDS-NG, *Transaction Report for VA Award ID VA662C14446* (Sept. 29, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA662C14446. It was awarded to one of Kingdomware's direct competitors, LiveProcess Inc., which is not a veteran-owned small business. *See id.*

C. GAO No. 406228. The VA also awarded the third contract to LiveProcess by issuing a delivery order on November 28, 2011, under LiveProcess's FSS contract, without first considering whether § 8127(d) required setting aside the opportunity for competition restricted to veteran-owned small businesses. *See Matter of Kingdomware Techs.—Costs*, 2012 WL 1655097, at *1 (Comp. Gen. May 10, 2012); JA28; Am. Compl. ¶¶ 45-47. In defending this procurement in a bid protest filed by Kingdomware, the VA argued that it was actually an exercise of an option under a 2010 purchase order, but the VA was unable to substantiate that claim. *Kingdomware Techs.*, 2012 WL 1655097, at *1. The agency represented to the GAO that it would take corrective action by re-bidding the contract (*id.*), but it had not done so by the time Kingdomware filed the amended complaint (Am. Compl. ¶ 47).

The contract lasted 10 months, ending September 2012. *See* FPDS-NG, *Transaction Report for VA Award ID VA24712F0325* (Dec. 1, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24712F0325.

* * *

In sum, each of the three contracts at issue in this case lasted 10-15 months. Each appears to have been fully performed by no later than May 2013, while this case was pending in the courts below. Proceedings in the Claims Court alone lasted nine months, from March 2012 to December 2012, and would have been substantially longer if the parties had not agreed on procedures to streamline them. JA1-3, 30-32, 35. Proceedings in the Federal Circuit lasted approximately twice that long, from January 2013 to September 2014. JA4-5.

II. THERE IS A LIVE AND JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES

Even assuming the three specific contracts prompting this suit have been fully performed, there remains a live case or controversy between the parties necessitating this Court's resolution. This Court has long recognized "a special category of disputes that are 'capable of repetition' while 'evading review.'" *Turner* v. *Rogers*, 131 S. Ct. 2507, 2515 (2011) (quoting *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911)). In those cases, the Court's jurisdiction to resolve the dispute is not "defeated simply because the order attacked has expired." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976).

A dispute meets the "capable of repetition, yet evading review" standard when "'(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" *Turner*, 131 S. Ct. at 2515 (brackets omitted; quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam)); *accord FEC*

v. *Wisconsin Right to Life, Inc.* (*WRTL*), 551 U.S. 449, 462 (2007).

The present dispute easily satisfies this standard. Indeed, controversies like this one, involving government procurement disputes, are "a paradigm" of the kind of cases likely to satisfy the "'capable of repetition yet evading review'" standard. *Kinnett Dairies, Inc.* v. *Farrow*, 580 F.2d 1260, 1266 (5th Cir. 1978) (dispute over small business set-asides). "[D]isputes over the terms or awards of government contracts ... often involve short contract periods and repeat bidders," and thus are among the "most commonly encountered" situations that are capable of repetition yet evading review. 13C Wright et al., *Federal Practice and Procedure* § 3533.8 (3d ed. 2008) (footnotes omitted).

A. Capable Of Repetition

A controversy is "capable of repetition" when there is "a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 551 U.S. at 463 (internal quotation marks omitted); *accord Turner*, 131 S. Ct. at 2515 ("'reasonable' likelihood"); *Press-Enterprise Co.* v. *Superior Ct.*, 478 U.S. 1, 6 (1986) ("can reasonably be assumed"). Kingdomware's underlying dispute with the VA about the proper interpretation of § 8127(d) is virtually certain to recur and indeed has already recurred several times during the pendency of this litigation.

To start, Kingdomware remains a certified service-disabled veteran-owned small business listed in the VA's database. VA, *Vendor Information Pages: Kingdomware Technologies, Inc.*, https://www.vip.vetbiz.gov/Public/Search/ViewSearchResults.aspx?SCID=2753179

(last visited Nov. 20, 2015); JA33-34; Barton Decl. ¶ 3.[2] Kingdomware intends to maintain this status going forward. Barton Decl. ¶ 3; *see* 13 C.F.R. § 19.102 (size standards). Kingdomware thus remains eligible for restricted competition pursuant to the Rule of Two in § 8127(d). 38 U.S.C. § 8127(e)-(f).

Kingdomware also continues to offer a broad range of web, software, and database services, including custom computer programming, of the type that the VA and other government agencies routinely procure. Barton Decl. ¶¶ 4, 6. For example, a search of the FPDS-NG database reveals that, since this suit commenced, the VA has repeatedly issued delivery orders to enter into small to mid-sized contracts for "custom computer programming services."[3] Kingdomware has performed and is currently performing custom programming for other government agencies. *E.g.*, FPDS-NG, *Transaction Report for HHS Award ID HHSN271201500128U* (Sept. 23, 2015), https://www.

---

[2] Timothy Barton is the founder, owner, and Chief Executive Officer of Kingdomware. Concurrently with this filing, Kingdomware has submitted a request to lodge Mr. Barton's declaration attesting to certain facts that may facilitate the Court's consideration of the questions addressed in this supplemental brief.

[3] FPDS-NG, *List of Contract Actions*, https://www.fpds.gov/ezsearch/fpdsportal?s=FPDSNG.COM&sortBy=SIGNED_DATE&q=PRINCIPAL_NAICS_CODE%3A%22541511%22+DEPARTMENT_FULL_NAME%3A%22VETERANS+AFFAIRS%2C+DEPARTMENT+OF%22++SIGNED_DATE%3A%5B2012%2F03%2F15%2C2015%2F11%2F20%5D++AWARD_TYPE%3A%22delivery%22++OBLIGATED_AMOUNT%3A%5B25000%2C250000%5D&indexName=awardfull&y=13&x=14&templateName=1.4.4&desc=Y (last visited Nov. 20, 2015) (331 results in search for VA delivery orders between March 15, 2012 and November 20, 2015 for custom computer programming services valued between $25,000 and $250,000).

fpds.gov/ezsearch/fpdsportal?q=HHSN271201500128U (contract awarded to Kingdomware to provide "custom computer programming services" to NIH).

The VA has made clear that it will continue to use the FSS system to procure goods and services without first considering the Rule of Two in § 8127(d). JA8-10 (VA press release); *see also* U.S. Br. 23 (asserting that the VA may procure from the FSS "without applying Section 8127's preference for awarding new contracts" (capitalization altered)). The VA has also acknowledged that, depending on the year, anywhere from 20% to 60% of its procurements are conducted via the FSS. Opp. 10; U.S. Br. 40. Its stated policy of not applying § 8127(d) to FSS procurements thus implicates numerous transactions each year.

Given Kingdomware's demonstrated and persistent effort to obtain contracts from the VA and the VA's entrenched unwillingness to apply § 8127(d) as written, there is a "'reasonable' likelihood," *Turner*, 131 S. Ct. at 2515, if not a virtual certainty, that the same underlying dispute between the parties will be repeated in the future. Kingdomware's bid protests vividly illustrate that likelihood. By the time Kingdomware filed its amended complaint in this action, it had already filed at least nine bid protests with the GAO concerning the VA's failure to apply the Rule of Two. JA25. During this litigation, Kingdomware filed several additional protests with the GAO. *E.g.*, *Matter of Aldevra; Kingdomware Techs.* (*Kingdomware I*), 2012 WL 10245509 (Comp. Gen. Oct. 9, 2012); *Matter of Kingdomware Techs.* (*Kingdomware III*), 2013 WL 393193 (Comp. Gen. Jan. 31, 2013). A dispute that has *already* recurred during the pendency of litigation is manifestly "capable of repetition," as this Court has recognized. *See Turner*, 131 S. Ct. at 2515 (finding reasonable like-

lihood of repetition in part based on recurrence of dispute following expiration of challenged action); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 775 & n.10 (1978) (threat of further enforcement against appellant during appeal of previous enforcement action further supported likelihood of repetition).

The rate of Kingdomware's formal protests slowed considerably after the VA repeatedly refused to follow the GAO's recommendations, prompting the GAO to announce that although it stood by its interpretation of § 8127(d), it would no longer hear bid protests on the issue because protestors could not "obtain meaningful relief" from the VA. *Matter of Kingdomware Techs.—Reconsideration* (*Kingdomware II*), 2012 WL 6463498, at *2 (Comp. Gen. Dec. 13, 2012). The decline in protests after the GAO's announcement, however, in no way indicates that the underlying problem has ceased to affect Kingdomware. Barton Decl. ¶ 7. The company remains highly interested in contracting opportunities with the VA and continues to be affected by the VA's refusal to apply the Rule of Two to the FSS. *Id.* ¶¶ 5, 8.

B. Evading Review

1. A controversy evades review when "'the challenged action is in its duration too short to be fully litigated prior to cessation or expiration.'" *WRTL*, 551 U.S. at 462. If a challenged action is "by nature short-lived," such that it would evade "considered plenary review in this Court" even when it recurs, the case is not moot. *Nebraska Press Ass'n*, 427 U.S. at 547; *see also Press-Enterprise Co.*, 478 U.S. at 6 (dispute evades review when the challenged conduct is "typically of short duration"); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979) (evades review where challenged

action would expire "before appellate review is completed"); *Weinstein*, 423 U.S. at 148 (evades review where the "'great majority'" of the challenged actions "'do not last long enough for complete judicial review of the controversies they engender'" (quoting *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 125-126 (1974)).

This Court originally announced the "capable of repetition, yet evading review" standard in a challenge to a two-year order. *Southern Pac. Terminal Co.*, 219 U.S. at 514-515. Since then, challenged conduct lasting two to three years or less has regularly been found to evade review. *E.g.*, *Wisconsin Dep't of Indus., Lab. & Hum. Relations* v. *Gould Inc.*, 475 U.S. 282, 285 n.3 (1986) (three-year debarment); *First Nat'l Bank of Boston*, 435 U.S. at 774 (eighteen-month referendum period); *Johnson* v. *Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010) (three-year labor agreement, despite remaining in effect for an additional two years after original three-year term); *Deja Vu of Nashville, Inc.* v. *Metropolitan Gov't of Nashville & Davidson County*, 274 F.3d 377, 390-391 (6th Cir. 2001) (two-year restriction on granting licenses following conviction); *see also Honeywell Int'l, Inc.* v. *NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) ("'orders of less than two years' duration'" presumptively evade review).

The 10-15 month contracts at issue in this case fall comfortably within these timeframes, and future contracts for which the same dispute will arise are likely to do so as well. The majority of government service contracts for which Kingdomware competes are for durations of approximately one year or less. Barton Decl. ¶ 9. Some of those contracts have options for one-year extensions at the discretion of the government, but even where those options are actually exercised, the total period is generally capped at no more than three

years. *Id.*[4] All of Kingdomware's bid protests after its amended complaint involved contracts with a base period of one year or less. *Id.*[5] Similarly, Kingdomware's recent contracts with other federal agencies have been for one year or shorter.[6] Finally, similar bid protests

---

[4] The appropriate time period to consider is the "mandatory ... term" of the contract, at least when additional extensions are "solely within the control of the defendant." *Johnson*, 623 F.3d at 1019 (dispute over mandatory three-year agreement not moot despite remaining in effect an additional two years); *see Doe* v. *Sullivan*, 938 F.2d 1370, 1376 (D.C. Cir. 1991) (R. Ginsburg, J.) (one-year consent waivers with possibility of renewal were too short to allow for full litigation because of their "generally short-term (one-year) character"); *cf. Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (defendant's voluntary conclusion of wrongful conduct does not moot case unless "'absolutely clear" it cannot "'reasonably be expected to recur'"). In any event, even when the options are exercised, the time periods in question remain well within the limits found to evade review.

[5] *See Kingdomware I*, 2012 WL 10245509, at *1 (protesting VA Award No. VA24612F4632); *Kingdomware II*, 2012 WL 6463498, at *1 (protesting VA Award No. VA255P657SC1615); *Kingdomware III*, 2013 WL 393193, at *2 (protesting September 28, 2012, award for emergency communication software for VA's Hines and other facilities). For the associated contract terms for each of these procurements, see, respectively: FPDS-NG, *Transaction Report for VA Award ID VA24612F4632* (July 31, 2012), https://www.fpds. gov/ezsearch/fpdsportal?q=VA24612F4632 (two-month award for "computer training" services); FPDS-NG, *Transaction Report for VA Award ID VA255P657SC1615* (Aug. 11, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA255P657SC1615 (award for "educational services" for one-year base contract term with option years); FPDS-NG, *Transaction Report for VA Award ID VA69D12F3663* (Sept. 28, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA69D12F3663 (one-year contract for emergency notification software for Hines facility).

[6] *See, e.g.*, FPDS-NG, *Transaction Report for HHS Award ID HHSN271201500128U* (Sept. 23, 2015), https://www.fpds.gov/ezsearch/fpdsportal?q=HHSN271201500128U (53-week contract

based on § 8127(d) by other veteran-owned small businesses have likewise involved contracts that would evade review, including one-time contracts to provide or install supplies.[7]

Short contract periods are typical for relatively small-value service contracts, in part because funds are appropriated annually. *See* 31 U.S.C. § 1341(a)(1)(B) (Antideficiency Act prohibition on contracts "before an appropriation is made"); 41 U.S.C. § 6301(a) (Adequacy of Appropriations Act). Short duration contracts also permit the agency to reassess and redefine its needs should they evolve in the future.

In light of these typical durations, it is highly unlikely that a future dispute between the government and Kingdomware—or indeed, any veteran-owned small business—over the correct interpretation of § 8127(d) could be considered by this Court before the underlying contract is fully performed. Over three and a half years have already passed since the effective date of the last contract at issue here, in March 2012.[8]

---

for programming services for the NIH); FPDS-NG, *Transaction Report for HHS Award ID HHSN271201400201P* (Feb. 21, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=HHSN271201400201P (one-year contract effective for data management services for the NIH, followed by eight-month extension); FPDS-NG, *Transaction Report for Award ID W91CRB14F0017* (June 2, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=W91CRB14F0017 (proposed one-year contract for emergency notification services for the Army, with actual contract period of three months).

[7] *See, e.g.*, *Matter of Legatus6, LLC*, 2011 WL 7485203 (Comp. Gen. Dec. 5, 2011) (installation contracts for solar panels); *Matter of Aldevra*, 2012 WL 10245511 (Comp. Gen. Nov. 12, 2012) (contracts to deliver or install kitchen equipment).

[8] That contract included additional option years, which the VA did not apparently exercise. *Supra* p. 3.

2. Over 16 years have passed since Congress, recognizing that "[t]he United States has done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises," endeavored to expand federal contracting opportunities for veteran-owned small businesses. Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, § 101(3), 113 Stat. 233, 234. Frustrated by the shortcomings of those initial legislative efforts, as well as a perceived "culture of indifference" among many contracting officers, Congress sought to make good on the United States' promise to promote contracting opportunities for veterans by enacting § 8127(d). H.R. Rep. No. 109-592, at 15-16 (2006).

Nine years later, the promise of § 8127 remains unfulfilled. Although the rationales have shifted, the end result has always been the VA's insistence that § 8127 does not apply to a large number of its procurements. That very real controversy touches on countless VA procurements each year and affects thousands of veteran small business owners and their families. These businesses are being deprived of the contracting opportunities Congress intended to set aside for them. Pet. Br. 53-55; Pet. Reply Br. 22. Each lost opportunity is a contract that cannot help to get a new veteran-owned business off the ground, to sustain and grow an existing business, or to serve as a springboard for contracting opportunities with other agencies.

The nation's service-disabled and veteran-owned small businesses urgently require an answer to the question presented. Litigation is expensive and uncertain and, for a variety of reasons, it will be difficult, if not impossible, for a service-disabled or veteran-owned

small business to put the present dispute before the Court ever again if this case is dismissed.[9]

CONCLUSION

There is a live controversy between the parties. The Court should exercise its jurisdiction and reverse the judgment below.

Respectfully submitted.

LAUREN B. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JASON D. HIRSCH
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

THOMAS G. SAUNDERS
Counsel of Record
SETH P. WAXMAN
AMY K. WIGMORE
GREGORY H. PETKOFF
AMANDA L. MAJOR
JOSEPH GAY
MATTHEW GUARNIERI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
thomas.saunders@wilmerhale.com

NOVEMBER 2015

---

[9] If the Court nonetheless concludes that the case is moot, the Federal Circuit's judgment should be vacated, and the case should be remanded with instructions to dismiss it as moot. *See Camreta* v. *Greene*, 131 S. Ct. 2020, 2035 (2011); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Otherwise, VA procurements would continue to be governed by an unreviewed interpretation of § 8127(d) that even the government does not defend. U.S. Br. 24-25, 50 n.10.